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**Aggregate Industries and Teamsters, Chauffeurs, Warehousemen and Helpers, Local 631, Affiliated with International Brotherhood of Teamsters.** Cases 28-CA-023220 and 28-CA-023250

October 31, 2014

**DECISION AND ORDER**

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA  
AND SCHIFFER

On July 8, 2013, the Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB No. 156. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit.

At the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the Board issued an order setting aside the Decision and Order, and retained this case on its docket for further action as appropriate.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, supra, we have considered de novo the judge's decision and the record in light of the exceptions and briefs. We have also considered the now-vacated Decision and Order, and we agree with the rationale set forth therein.<sup>1</sup> Accordingly, we affirm the judge's rulings, findings, and conclusions and adopt the judge's recommended Order to the extent and for the reasons stated in the Decision and Order reported at 359 NLRB No. 156, which is incorporated herein by reference. The

<sup>1</sup> In finding that the Respondent presented the Union with a fait accompli, we do not rely on *Dresser-Rand Co.*, 358 NLRB No. 97 (2012), cited in the vacated decision.

In addition, in finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act by changing the scope of the Construction unit, a permissive subject of bargaining, without the Union's consent, we do not rely on *Walt Disney World Co.*, 359 NLRB No. 73 (2013), cited in the vacated decision. Instead, we rely on *Wackenhut Corp.*, 345 NLRB 850, 852 (2005) (elimination of unit position and transfer of the relevant duties to non-unit positions was a change in unit scope requiring consent of the union), and *Holy Cross Hospital*, 319 NLRB 1361, 1361 fn. 2 (1995) (virtual elimination of a unit position was a change in the scope of the unit requiring the union's consent).

judge's recommended Order, as further modified herein, is set forth in full below.<sup>2</sup>

**ORDER**

The National Labor Relations Board orders that the Respondent, Aggregate Industries, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing the scope of the Construction Bargaining Unit by moving off-site material haul drivers from the Construction Bargaining Unit to the Ready-Mix Bargaining Unit without the Union's consent.

(b) Unilaterally moving off-site material haul work from coverage under the Construction Agreement to coverage under the Ready-Mix Agreement without giving the Union sufficient notice and an opportunity to bargain about the change.

(c) Changing the terms and conditions of employment of Construction Bargaining Unit employees by requiring them to work under the terms of its Ready-Mix Agreement.

(d) Bypassing the Union and dealing directly with its Construction Bargaining Unit employees, and denying employment opportunities to Construction Bargaining Unit employees who refuse to agree to work under the terms and conditions of its Ready-Mix Agreement.

(e) Bypassing the Union and dealing directly with its mechanical sweeper truck drivers in the Construction Bargaining Unit with regard to their terms and conditions of employment.

(f) Unilaterally, without notice to the Union or affording the Union an opportunity to bargain, assigning mechanical sweeper truck driving work to drivers who are represented by the Laborers Union, when such work had previously been performed by drivers who were included in the Construction Bargaining Unit.

(g) Unilaterally, without notice to the Union or affording the Union an opportunity to bargain, changing the terms and conditions of its mechanical sweeper truck drivers by treating them as employees in the bargaining unit covered by the Laborers' collective-bargaining agreement.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

<sup>2</sup> We shall modify the Order in accordance with our recent decision in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). We shall also substitute a new notice in accordance with *Tortillas Don Chavas*, supra, and *Durham School Services*, 360 NLRB No. 85 (2014).

(a) Restore the status quo ante with respect to both the Construction Bargaining Unit and the Ready-Mix Bargaining Unit, by returning the employees performing off-site material haul work back to the Construction Bargaining Unit from the Ready-Mix Unit, rescinding all unilateral changes in the employees' terms and conditions of employment, and continuing in effect all the terms and conditions of the Construction Agreement for those employees.

(b) Make former Construction Bargaining Unit employees performing off-site material haul work under the Ready-Mix Agreement whole for any loss of wages and other benefits suffered as a result of its unlawful actions, in the manner set forth in the Amended Remedy section of this decision.

(c) Reimburse former Construction Bargaining Unit employees for any expenses resulting from the Respondent's failure to make any required contributions to benefit funds, in the manner set forth in the Amended Remedy section of this decision.

(d) Within 14 days from the date of this Order, offer any former Construction Bargaining Unit employee who lost employment for refusing to work under the terms and conditions of the Ready-Mix Agreement full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(e) Make any former Construction Bargaining Unit employee who lost employment for refusing to work under the terms and conditions of the Ready-Mix Agreement whole for any loss of earnings and other benefits suffered as a result of the unlawful action against them, in the manner set forth in the Amended Remedy section of this decision.

(f) Compensate former Construction Bargaining Unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(g) Within 14 days from the date of this Order, remove from its files any reference to the loss of employment opportunities for any former Construction Bargaining Unit employee who lost employment for refusing to work under the terms and conditions of the Ready-Mix Agreement, and within 3 days thereafter, notify them in writing that this has been done and that the unlawful action will not be used against them in any way.

(h) Restore the status quo ante by returning and assigning the work of driving its mechanical sweeper trucks to

employees who are represented by the Union and employed in the Construction Bargaining Unit.

(i) Make sweeper truck drivers Andrew Barnum and Mike Crane whole for any loss of wages and other benefits suffered as a result of its unilateral change, in the manner set forth in the Remedy section of the judge's decision.

(j) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(k) Within 14 days after service by the Region, post at its facility in Las Vegas, Nevada and its truck yard in Sloan, Nevada, and distribute in the employees' mail slots, copies of the attached notice marked "Appendix."<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 1, 2010.

(l) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 31, 2014

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Mark Gaston Pearce, Chairman

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Kent Y. Hirozawa, Member

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<sup>3</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX  
NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT change the scope of the Construction Bargaining Unit by moving off-site material haul drivers from the Construction Bargaining Unit to the Ready-Mix Bargaining Unit without the Union's consent, or unilaterally move off-site material haul work from coverage under the Construction Agreement to coverage under the Ready-Mix Agreement without giving the Union sufficient notice and an opportunity to bargain about the change.

WE WILL NOT change the terms and conditions of employment of Construction Bargaining Unit employees by requiring them to work under the terms of our Ready-Mix Agreement.

WE WILL NOT bypass the Union and deal directly with our Construction Bargaining Unit employees, and WE WILL NOT deny employment opportunities to Construction Bargaining Unit employees who refuse to agree to work under the terms and conditions of our Ready-Mix Agreement.

WE WILL NOT bypass the Union and deal directly with our mechanical sweeper truck drivers in the Construction Bargaining Unit with regard to their terms and conditions of employment.

WE WILL NOT unilaterally, without notice to the Union or affording the Union an opportunity to bargain, assign mechanical sweeper truck driving work to drivers who

are represented by Laborers' International Union of North America, Local 872 (Laborers), when such work had previously been performed by drivers who were included in the Construction Bargaining Unit.

WE WILL NOT unilaterally, without notice to the Union or affording the Union an opportunity to bargain, change the terms and conditions of our mechanical sweeper truck drivers by treating them as employees in the bargaining unit covered by the Laborers' collective-bargaining agreement.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of the rights listed above.

WE WILL restore the status quo ante with respect to both the Construction Bargaining Unit and the Ready-Mix Bargaining Unit, by returning the employees performing off-site material haul work back to the Construction Bargaining Unit from the Ready-Mix Unit, rescinding all unilateral changes in the employees' terms and conditions of employment, and continuing in effect all the terms and conditions of the Construction Agreement for those employees.

WE WILL make former Construction Bargaining Unit employees performing off-site material haul work under the Ready-Mix Agreement whole for any loss of wages and other benefits suffered as a result of its unlawful actions, plus interest compounded daily.

WE WILL reimburse former Construction Bargaining Unit employees for any expenses resulting from the Respondent's failure to make any required contributions to benefit funds, plus interest compounded daily.

WE WILL, within 14 days from the date of the Board's Order, offer any former Construction Bargaining Unit employees who lost employment for refusing to work under the terms and conditions of the Ready-Mix Agreement full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make any former Construction Bargaining Unit employees who lost employment for refusing to work under the terms and conditions of the Ready-Mix Agreement whole for any loss of earnings and other benefits suffered as a result of the unlawful action against them, less any net interim earnings, plus interest compounded daily.

WE WILL compensate former Construction Bargaining Unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the loss of employment opportunities for any former Construction Bargaining Unit employees who lost employment for refusing to work under the terms and conditions of the Ready-Mix Agreement, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the unlawful action will not be used against them in any way.

WE WILL restore the status quo ante by returning and assigning the work of driving our mechanical sweeper trucks to employees who are represented by the Union and employed in the Construction Bargaining Unit.

WE WILL make sweeper truck drivers Andrew Barnum and Mike Crane whole for any loss of wages and other benefits suffered as a result of our unilateral change, plus interest compounded daily.

AGGREGATE INDUSTRIES

The Board's decision can be found at [www.nlrb.gov/case/28-CA-023220](http://www.nlrb.gov/case/28-CA-023220) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

